

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Anniciello and Another (8859/2018) [2021] ZAWCHC 91 (22 April 2021) [2021] ZAWCHC 91

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

8859/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 8859/2018

Before: The Hon. Mr Justice Binns-Ward

Hearing: 20-21 April 2021

Judgment: 22 April 2021

In the

matter between:

ABSA
BANK
LTD
Plaintiff
and
A.
ANNICIELLO
First Defendant
T.T.
ANNICIELLO
Second Defendant

JUDGMENT

(Delivered by email to the parties' legal representatives and by release to SAFLII.

The judgment shall be deemed to have been handed down at 14h15 on
22 April 2021.)

BINNS-WARD J:

[1] In this matter the plaintiff bank sued the first and second defendants in their capacities as trustees for the time being of the Anniciello Family Trust for payment of the amount outstanding in terms of a loan that was secured by the mortgage of the Trust's fixed property. The plaintiff also sought an order declaring the mortgaged property directly executable. An order was taken by agreement on 21 April 2021, in terms of which judgment as prayed in the summons was granted in favour of the bank.

This judgment is concerned with the issue of the costs of certain interlocutory applications that were reserved for later determination

when the aforementioned order was made.

[2] The first and second defendants are married to one another. They are currently engaged in reportedly acrimonious divorce proceedings. The mortgaged property was formerly the common home. It is currently occupied by the second defendant, who alleges that she would have nowhere else to live should it be sold before the divorce action, including the patrimonial consequences of the dissolution of the marriage, is determined. Both defendants, using separate firms of attorneys, initially gave notice of intention to defend the action against the Trust. The first defendant thereafter withdrew his opposition, but the second defendant purported to persist on the Trust's behalf with the defence of the action.

[3] It is trite that the Trust required to be represented by the trustees acting jointly, and that it was therefore not competent for only one of them, acting alone, to represent it in the pending legal proceedings. Astute to this, the plaintiff served notice in terms of Uniform Rule 7 on the attorneys representing the second defendant in the proceedings to satisfy it that they were duly empowered to act on the Trust's behalf in the action. Unsurprisingly, the second defendant's attorneys were unable to produce the necessary authority. In tandem with the process in terms of Rule 7, the plaintiff also brought an application in terms of Rule 35(7) to compel discovery by the trustees.

[4] The plaintiff's application in terms of Rule 35 was set down to be heard on 20 April 2021 on the opposed motion roll. In its replying affidavit in that application the plaintiff indicated its intention to apply for default judgment against the Trust on 20 April by reason that it had become apparent that the action was not competently opposed. The second defendant in the meantime launched an application in her personal capacity for leave to intervene as a defendant in the action. She alleged in support of that application that the trustees had

never resolved to conclude the transactions with the plaintiff bank that were the basis for the latter's claim. The plaintiff opposed the application and the acting judge presiding in the unopposed motion court on 25 March 2021 was persuaded to postpone it for hearing on an opposed basis on the fourth division roll in late October. It is not apparent why the learned acting judge did not postpone the intervention application for hearing with the

related matters already set down for hearing on 20 April, which would have been a more pragmatic course.

[5] In the result, as might have been predicted in the context of the date set for the hearing of the intervention application, when the plaintiff's Rule 35(7) came up for hearing before me on 20 April there was an application by the second defendant that it be postponed for hearing on a date after the determination of her application for leave to intervene. The application for postponement was opposed by the plaintiff. The basis for the opposition was that the second defendant had no legally cognisable basis to intervene in the pending action in her personal capacity and that the intervention application was a ploy to keep the bank out of the relief against the Trust to which it was clearly entitled in the absence of any defence to the action by the trustees acting jointly.

[6] It was obvious in the circumstances that the bank's applications set down for hearing on 20 April could not proceed while the second defendant's application for leave to intervene as a defendant in the action remained undecided. It was also clear that deferring the hearing of the intervention application until much later in the year had been ill advised. There was no good reason why the intervention application could not be heard at the same time as the bank's application, which in

essence had become one for default judgment. There was an obvious overlap of critical considerations in the respective applications. The efficient administration of justice dictated that the second defendant's application to intervene be promoted on the roll to be heard together with the plaintiff's application, thereby rendering her application for a postponement of those proceedings effectively redundant. I therefore made it clear when the matters were called on 20 April that I intended to direct that the hearing of all the applications together proceed accordingly.

[7] The second defendant's counsel indicated that it was intended to deliver a replying affidavit in the intervention application and time would be needed for such to be drafted. The timetable included in the order made by the third division judge had given the second defendant until sometime in June for that purpose. I accordingly indicated that I would hear all the applications together on 4 May 2021 and requested counsel to provide me with a draft order incorporating an agreed timetable to enable a consolidated hearing to proceed on that date.

- [8] It was in the course of the exchanges between the parties' legal representatives to settle the draft that I had asked them to prepare that settlement was reached that the plaintiff could take judgment against the Trust in the action. Settlement could not be reached, however, on the incidence of liability for the costs of the second defendant's intervention and postponement applications.
- [9] The plaintiff was, for obvious reasons, content to take an order that the costs in issue be paid by the Trust, but abided the court's decision whether the second defendant should not rather be liable for them in her personal capacity. The first defendant, who was not an active party in either of the applications, but who was represented at the hearings before me on 20 and 21 April by counsel with a watching brief, instructed, so I was informed at the hearing on 20 April, to ensure that he was not personally mulcted in costs, was opposed to the Trust being liable for the costs. It would appear that the first defendant took up the position during the settlement negotiations that ensued after the matter was stood down on 20 April. His counsel sought to justify his ability to advance the first defendant's position, notwithstanding that he had not formally entered the lists in any of the proceedings, by invoking the so-called 'Beningfield exception'.
- [10] The exception, named after the Privy Council's Opinion in *Beningfield v Baxter* (Natal) [1886] UKPC 49 (7 December 1886), (1887) LR 12 App Cas 167, 12 App Cas 167, 8 NLR 81, manifests the principle that someone who has a vested interest in the proper administration of a trust may sue in a representative capacity in the trust's interests when the trustees are in delinquent breach of their responsibilities towards the trust and disabled from litigating on the trust's behalf. It constitutes an exception to the rule that only the trustees may litigate on a trust's behalf. As the late Appellate Division noted in *Gross and Others v Pentz*
- [1996] ZASCA 78; 1996 (4) SA 617 (A) at 628G, 'the rationale for the exception was identified as being the impossibility of the delinquent trustee or executor suing himself'.
- [11] I am uncertain whether the first defendant's informal intervention on the issue of costs falls within the ambit of the exception because he is a co-trustee with access to a deadlock-breaking mechanism under the trust instrument, but, for the reasons that follow, it is unnecessary to reach a firm conclusion one way or the other in that regard.
- [12] In my view, the result of the principal case, exemplified by the judgment granted by agreement in favour of the plaintiff, demonstrates that the second defendant's abandoned application for leave to intervene in her personal capacity was misconceived. Certainly, the decision to abandon the application accorded with my own *prima facie* view of its poor prospects after I had read the papers.

[13] It was the intervention application, and the postponement of the hearing thereof to later in the year, that led to the application for a postponement of the matters set down to be heard on 20 April. The applications brought by the second defendant were instituted in her personal capacity. It seems clear that she was motivated not by the interests of the Trust, but by her own position in the pending matrimonial proceedings with the first defendant, in which she is reportedly contending that the

Trust is 'an alter ego trust' - by which she appears to imply that the assets of the Trust should be taken into account for the purposes of determining the patrimonial consequences of the dissolution of her marriage with the first defendant.

[14] In the circumstances, and irrespective of the argument advanced on behalf of the first defendant at the hearing on 21 April, I consider it appropriate that the second defendant should bear the costs occasioned by her ill-advised interventions. Had the second defendant any intention to defend the action on behalf of the Trust in the face of her co-trustee's unwillingness to join her in that endeavour, there were deadlock-breaking mechanisms available in terms of the trust deed that would have enabled her to do so if she were able to persuade an independently appointed counsel that defending the action was well-advised. The eventual outcome of the action suggests that it is uncertain, if not unlikely, that independent counsel would have considered it well-advised for the Trust to incur the expense of opposing the plaintiff's claim. I am unable in the circumstances to identify a plausible basis for lumbering the Trust with liability for the costs incurred by the plaintiff in meeting the applications launched by the second defendant. I recognise the realism in the submission by the second defendant's counsel that the upshot may be to introduce or entrench a further source of acrimony between the first and second defendants in the pending matrimonial proceedings, which is unfortunate, but that is not a properly cognisable consideration in my judgment.

[15] The plaintiff asked that it be awarded costs in the intervention and postponement applications on the scale as between attorney and client, as provided in terms of its contractual relationship with the Trust. In my judgment, however, the costs clauses in the contracts between the plaintiff and the Trust are not applicable in respect of the interlocutory litigation instituted by the second defendant in her personal capacity. I am also not persuaded that the second defendant's conduct, ill-advised as it might have been, merits a punitive costs order. The plaintiff will therefore be awarded its costs against the second defendant on the usual party and party scale.

[16] In the result, the following orders are made in respect of the issues reserved on costs:

1. The second defendant shall be liable in her personal capacity for the plaintiff's costs of suit in the second defendant's application for leave to intervene in the action in her personal capacity, including the costs reserved on 25 March 2021 and in her attendant application for the postponement of the proceedings in the principal case set down for hearing on 20 April 2021.

2. The second defendant shall also be liable in her personal capacity for the plaintiff's costs incurred in respect of the hearing on costs on 21 April 2021.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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